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No. 00-927

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
Petitioner,

v.

MALLARD BAY DRILLING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE TRANSPORTATION INSTITUTE IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE TRANSPORTATION INSTITUTE IN SUPPORT OF THE RESPONDENT [1]

INTEREST OF *AMICUS* [2]

The Transportation Institute is a Washington D.C.-based non-profit organization dedicated to maritime research, education, and promotion. The Institute supports a wide range of programs that promote the strength of America's maritime capability. The Institute believes that the decision under review properly recognized the primary role of the

[1] Pursuant to Rule 37.6 of this Court, *amicus* certifies that no counsel for any party to this case authored this brief, in whole or in part, and that no one outside The Transportation Institute made a monetary contribution to the brief's preparation or submission.

[2] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

United States Coast Guard in regulating vessel safety, and that insertion of the Occupational Safety and Health Administration (OSHA) into this area would introduce conflict, uncertainty, and duplication that Congress never intended.

The Institute's member companies participate in all phases of the nation's deep sea, foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland and coastal waterways. They operate vessels that are required by statute to be inspected by the United States Coast Guard ("inspected vessels"), and vessels not subject to a statutory inspection requirement ("uninspected vessels"). The uninspected vessels include tugs, barges, and survey, crew, supply, and dredging vessels. All vessels operated by the Institute's member companies are U.S. registry—crewed by American citizens, operating under the world's highest safety standards, and proudly flying the American flag.

The Transportation Institute has a strong interest in ensuring that America develops a maritime policy that maintains a viable, balanced, safe, and dependable water transportation capability. To this end, the Institute seeks the continued growth and modernization of America's waterway infrastructure. The Institute monitors the activities of the federal and state governments, and their administrative agencies, as they affect waterborne transportation. The Institute plays a prominent role in national forums, seminars, and public policy meetings where questions of maritime policy are under scrutiny.

The position taken by the Petitioner regarding the purported authority of OSHA to regulate all uninspected vessels contravenes statutory provisions reflecting Congress' long-standing policy decision that the U.S. Coast Guard regulate the working conditions of seamen onboard vessels. The remedy sought would add a layer of regulation on

maritime workers and companies that was never envisioned, and that would be developed and enforced by individuals with no concept of life in a maritime environment. The Transportation Institute respectfully submits that such a result would impede rather than promote maritime safety, and impose a level of costs and uncertainty on the industry that would serve no useful purpose.

SUMMARY OF ARGUMENT

Petitioner understates the level of Coast Guard regulation of uninspected vessels, and incorrectly state that only "very limited" safety regulation applies to all uninspected vessels. The 1983 Memorandum on Understanding (MOU) between the Coast Guard and OSHA applies only to inspected vessels, and does not address uninspected vessels. It does not follow, however, that all uninspected vessels thereby fall under OSHA's jurisdiction, or that the question of OSHA's jurisdiction can be resolved by some separate understanding between the two agencies.

The Coast Guard, under proper authority, has issued numerous safety regulations that apply to uninspected vessels. These are not limited to the safety equipment required by statute to be provided on these vessels (such as fire extinguishers, means of ventilation, and emergency locating equipment), but also include items such as guards, ladders, rails, and gangway lifelines; fuel tank ventilation; and pollution prevention regulations. These regulations also do not apply uniformly to all uninspected vessels. Many of these regulations have been issued since the MOU was signed in 1983, reflecting the Coast Guard's attention to the safety regulation of uninspected vessels. The Fifth Circuit's decision properly recognizes the primacy of the Coast Guard's regulatory authority.

Congress has also recognized the primacy of the Coast Guard's role by providing that any delegation of the maritime

safety and commerce functions of the shipping laws, including regulation of uninspected vessels, be made exclusively to the Coast Guard. Inserting OSHA into the regulation of uninspected vessels would be inconsistent with this expression of Congressional intent.

ARGUMENT

I. COAST GUARD REGULATION OF UNINSPECTED VESSELS IS BROAD AND PERVASIVE, PRECLUDING JURISDICTION IN THIS AREA BY OSHA.

Petitioner's argument that OSHA should be given a role in the regulation of uninspected vessels relies heavily on the assertion that the Coast Guard's authority in this area is extremely limited. *See, e.g.*, Petitioner's Brief at 4-5 n.1. Petitioner thus argues that OSHA regulation is necessary to avoid risk to the safety and health of workers on these vessels. *See id.* at 35.

Contrary to the impression left by the Petitioner's brief, however, the Coast Guard has issued a series of appropriate regulations under its authority that are applicable to uninspected vessels and to seamen working on uninspected vessels. These cover many diverse areas of safety. Moreover, these regulations do not apply uniformly to all types of uninspected vessels, demonstrating that the Coast Guard has exercised its judgment as to its regulation of this area.

A comprehensive list of these regulations is appended to this brief. They include guards, ladders, rails, and gangway lifelines (46 C.F.R. § 92.25 (2000)); fuel tank vents (46 C.F.R. § 56.50-85 (2000)); and pollution prevention (33 C.F.R. pt. 155 (2000)).

Many of these regulations have been established or amended since the Coast Guard and OSHA entered into the MOU that Petitioner now asserts allows OSHA regulation of

uninspected vessels. For example, 33 C.F.R. pt. 160 (2000), which governs ports and waterways safety, is expressly made applicable to all vessels, including uninspected vessels. 33 C.F.R. § 160.103 (2000). These regulations were originally placed into effect in 1983 but have been amended in 1988, 1994, 1996, 1997, and 1998. Among other things, they authorize the Coast Guard to deny entry to any port or place within the jurisdiction of the United States to any vessel that fails to comply with Port and Tanker Safety Act or its regulations (33 C.F.R. § 160.107 (2000)); they authorize the Coast Guard to issue special orders to vessels to operate as it directs (33 C.F.R. § 160.111 (2000)); they authorize the Coast Guard to prohibit any vessel that it believes unsafe from operating on the navigable waters (33 C.F.R. § 160.113 (2000)); and they authorize the Coast Guard to establish safety zones (33 C.F.R. § 160.5 (2000)).

The Coast Guard has thus exercised and continues to exercise its statutory mandate to cover safety aspects of all vessels, including uninspected vessels. 14 U.S.C. § 2 requires the Coast Guard to "promulgate and enforce regulations for the promotion of safety of life and property on . . . waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive agency." The Fourth Circuit has construed this statute to establish

> . . . a delineation of responsibility between the Coast Guard and Secretary of Labor in this area: the Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive.

Taylor v. Moore-McCormack Lines, Inc., 621 F.2d 88, 92-93 (4th Cir. 1980).

Sound practical reasons also support the conclusion that OSHA's authority should not be extended to the regulation of uninspected vessels. As the Fifth Circuit has noted,

> Section 4(b)(1) [of the OSHA Act, 29 U.S.C. § 653 (b)(1)] evidences a general congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise.

Donovan v. Texaco, Inc., 720 F.2d 825, 827 (5th Cir. 1983).

Allowing OSHA into the area of maritime safety regulation under the test proposed by the Petitioner would require seamen and employers to ascertain whether the Coast Guard had either issued a regulation that applied or might be considered to apply to a given "working condition" on a particular vessel or had determined not to do so. Each exercise of OSHA's authority would require a thorough analysis, based on a complete record, as to the extent of the Coast Guard's regulation of the particular type of vessel involved and of the relationship between OSHA and Coast Guard regulation.

Moreover, unless sufficient scope and space were given to the Coast Guard's issuance of regulations or to its decisions not to regulate, considerable uncertainties would also continue as to the permissible scope of OSHA's authority. Allowing OSHA to regulate on the basis that a particular working condition had not been expressly addressed by the Coast Guard would lead to ultimately indeterminate assessments as to what constituted a "working condition" and as to the relationship between each regulation and the operations of the vessel. These burdens are eliminated by the delineation of a distinct sphere for regulation of vessels and seamen by the Coast Guard, where it has historically resided.

The harms of duplicative OSHA regulation are considerably heightened in the context of the regulation of seamen aboard vessels on navigable waterways. As this Court recently noted, "Congress has legislated in the field [of maritime commerce] from the earliest days of the Republic, creating an extensive statutory and regulatory scheme." *United States v. Locke*, 529 U.S. 89, 108 (2000). The living and working conditions of seamen have historically been the subject of regulation under the shipping laws down to the minutest detail, in recognition of the uniqueness of a seamen's status. *See Donovan*, 720 F.2d at 828.

The Coast Guard, as the nation's maritime safety agency, has also developed expertise with respect to the safety of vessels and seamen that OSHA simply does not possess. Indeed, in the present case, the Coast Guard undertook all aspects of the investigation concerning the vessel and the competency of the crew. Although the ALJ found that OSHA had conducted a "limited" investigation, he also noted that OSHA did not make any inspection of the barge or interview any of the crew. ALJ Op. at 4-5, found in Petition for a Writ of Certiorari, Appendix B, at 11a-12a.[3] OSHA's role was thus essentially limited to issuing the citations.

Allowing OSHA to undertake partial regulation of uninspected vessels would ignore the fact, which this Court also recognized in *Locke*, that vessels operate as integrated systems. 529 U.S. at 112 (noting that limited state regulation

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[3] Respondent has noted that OSHA undertook no investigation: "OSHA, on the other hand, and in particular, its investigator, Mike Sophrer, conducted no investigation into this casualty. To quote Mr. Sophrer, he 'stayed in the background' and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, he did nothing but 'ride the coattails' of the investigation by the United States Coast Guard." Respondent's Brief in Opposition to the Petition for Writ of Certiorari at 2.

of "local peculiarities" would not "require adjustment of systemic aspects of the vessel"). Giving OSHA a role with respect to the regulation of uninspected vessels would require at best an extremely burdensome and difficult assessment of the relationship of the OSHA requirements to the overall operation of the vessel. Indeed, the reasoning that OSHA may regulate uninspected vessels in any area in which the Coast Guard has not expressly regulated or determined not to regulate could be applied as well to OSHA regulation of inspected vessels; yet all parties agree that OSHA has no proper role with respect to inspected vessels.

Finally, dual regulation would be particularly difficult for operators who operate both inspected and uninspected vessels, as do many of the Institute's members. These operators often comply on all of their vessels with the requirements applicable to inspected vessels. Under the Petitioner's approach, however, operators taking this approach would find themselves subject to another layer of regulation by OSHA as well.

In sum, OSHA regulation simply would not fit with the statutory and regulatory scheme applicable to uninspected vessels. Were it to be applied, the result at best would be detailed and indeterminate assessments with respect to each type of uninspected vessel as to the permissible limits of OSHA regulations.

II. ALLOWING OSHA TO REGULATE WORKING CONDITIONS OF SEAMEN ON UNINSPECTED VESSELS WOULD BE INCONSISTENT WITH CONGRESS' DETERMINATION TO MAKE THE COAST GUARD THE EXCLUSIVE AUTHORITY TO REGULATE VESSELS AND SEAMEN UNDER THE SHIPPING LAWS.

In 1983, Congress revised and consolidated the shipping laws, combining all of the statutes governing "vessels and seamen" into Subtitle II of Title 46 of the U.S. Code. Pub. L. 98-89, 97 Stat. 501. In doing so, Congress expressly provided that all of the duties and powers conferred by that Subtitle, including any rulemaking authority governing vessels and seamen, could be delegated only to the Coast Guard. 46 U.S.C. § 2104(a).

A 1997 decision of the District of Columbia Circuit confirmed that 46 U.S.C. § 2104 limits delegation of Subtitle II functions to the United States Coast Guard. *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). The D. C. Circuit held that Section 2104 expresses Congress' plain intent that the seamen's safety and welfare functions of the shipping laws should be exclusively the province of the Coast Guard as the nation's maritime safety agency, unless the Secretary chose to retain those duties. 129 F.3d at 185. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 362 (3d Cir. 1993)("The significance of the public policy implicated here is highlighted by Congress' decision to authorize a specific agency, the Coast Guard, to oversee and ensure maritime safety, 46 U.S.C. §§ 2103, 2104 (1988), just as it created the FAA to promote aviation safety . . .").

Allowing duties or powers related to seamen's safety to be delegated to OSHA would be inconsistent with the policy expressed in 46 U.S.C. § 2104 to center these safety and welfare functions in the Coast Guard. The regulation of working conditions on uninspected vessels directly affects seamen subject to regulation under Title II, and is most properly the subject of regulation by the Coast Guard.

Moreover, the Coast Guard's acquiescence in OSHA's regulation of uninspected vessels cannot provide OSHA with regulatory authority in contravention of this policy. *Amicus* in support of Petitioner contends, for example, that because OSHA and the Coast Guard are "united" in their view of this case, "this Court is not being asked to resolve a conflict over regulatory 'turf' between the Department of Labor and OSHA on the one hand and the Department of Transportation and the

Coast Guard on the other." *Amicus Curiae* Brief of the Association of Trial Lawyers of America at 10. But an agreement between the Coast Guard and OSHA, whatever its origin or purpose, cannot resolve the question as to whether allowing OSHA to regulate in this area is proper.

CONCLUSION

For the reasons stated above, The Transportation Institute respectfully submits that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

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LIST OF REGULATIONS THAT APPLY TO UNINSPECTED VESSELS

Navigation Lights & Signals	33 C.F.R. pt. 81 (2000)
Pollution Prevention Regulations	33 C.F.R. pt. 155 (2000)
Equipment Test Records	33 C.F.R. pt. 156 (2000)
Marine Sanitation Devices	33 C.F.R. pt. 159 (2000)
Ports & Waterways Safety	33 C.F.R. pt. 160 (2000)
Navigation Publications & Equipment	33 C.F.R. pt. 164 (2000)
Drug & Alcohol Testing	46 C.F.R. pt. 16 (2000)
Uninspected Vessels – General Provisions	46 C.F.R. pt. 24 (2000)
Life Preservers & Other Lifesaving Equipment	46 C.F.R. § 25.25 (2000)
Emergency Position Indicating Radio Beacons	46 C.F.R. § 25.26 (2000)
Fixed Fire Extinguishing Gear	46 C.F.R. § 25.30 (2000)
Backfire Flame Control	46 C.F.R. § 25.35 (2000) 46 C.F.R. § 25.40 (2000) 46 C.F.R. § 25.45 (2000) 46 C.F.R. § 25.50 (2000)
Special Operating Requirements	46 C.F.R. § 26.03 (2000)
Notice & Reporting of Casualty & Voyage Records	46 C.F.R. § 26.08 (2000)
Boarding	46 C.F.R. § 26.15 (2000)
Work Vest	46 C.F.R. § 26.30 (2000)
Towing Vessels	46 C.F.R. pt. 27 (2000)
Commercial Fishing Industry Vessels	46 C.F.R. pt. 28 (2000)
Hull Structure	46 C.F.R. § 42.09 (2000) 46 C.F.R. § 42.15 (2000)
Guards, Ladders, Rails & Gangways Lifelines	46 C.F.R. § 42.15-75 (2000)
Boilers	46 C.F.R. pt. 52 (2000)
Fuel Tank Vents	46 C.F.R. § 56.50-85 (2000)
Auxiliary Machinery	46 C.F.R. pt. 58 (2000) 46 C.F.R. pt. 61 (2000)
Thermal Fluid Heaters	46 C.F.R. pt. 61 (2000)
Liquefied Flammable Gas Systems for Heating/Cooking	46 C.F.R. § 61.15-10 (2000)

Hull Marks	46 C.F.R. § 67.121 (2000) 46 C.F.R. § 67.123 (2000)
General Alarms	46 C.F.R. § 113.25 (2000)
Annual Liferaft Servicing	46 C.F.R. § 160.151-57(p) (2000)
Lifejackets	46 C.F.R. § 199.620 (2000)